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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1446

ROBERT W. BARNES,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF KENTUCKY

LAIDLER B. MACKALL
STEPTOE & JOHNSON
1250 Connecticut Avenue
Washington, D.C. 20036
(202) 862-2020

PAUL C. HOBBS
GRAY, WOODS & COOPER
908 Second National Bank Bldg.
Ashland, Kentucky 41101

Attorneys for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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COUNTER-STATEMENT OF THE CASE

Petitioner has been an employee of the Holland Company for eighteen years. Petition for Certiorari ("Petn") at A-3. During that period, petitioner has worked in the railwelding operations of the Holland Company at several locations in the Eastern United States and Canada. Record Transcript ("R.") at 116-21. He was transferred from Edson, Alberta to the Holland Company's Worthington plant in 1971. R. 120.

At the heart of the Holland Company plant at Worthington is a unique A-1 railwelding machine owned by the Holland Company. Brief for Respondent Appendix

("App.") at 2a. This machine was developed and produced by A-1 Welders, Inc., a firm in Scotland. The Holland Company serves as the exclusive representative of A-1 Welders, Inc. in the United States and its skilled employees have exclusive knowledge and authority to control this specialized equipment. *Id.* at 2a-3a. Pursuant to a contract dated October 16, 1970, the Holland Company leased from respondent certain other, nonspecialized equipment and land on which to conduct railwelding operations at Worthington. R. 54.

On October 29, 1973, petitioner filed this suit against respondent railroad under the Federal Employers' Liability Act, 45 U.S.C. § §51 *et seq.* (1976), in the Circuit Court of Greenup County, Kentucky. Initially, petitioner alleged that he had been injured while working at the Worthington railwelding plant on July 15, 1971. Later, petitioner filed an amended complaint adding allegations of a second injury on April 2, 1973. On both occasions, petitioner had been working as either a foreman or a shift leader for the Holland Company. App. at 2b, R. 128.

Respondent moved for summary judgment on the ground that petitioner was not an employer of respondent railroad within the meaning of the Act. Petitioner cross-moved for partial summary judgment on the same issue. At the hearing held on August 9, 1974, respondent submitted the deposition of the plaintiff as well as affidavits from the supervisory personnel of the Holland Company and the railroad in order to demonstrate that petitioner was not an employee of respondent. *See* Appendices A, B and C.

These submissions established that petitioner had been assigned to this project by the Holland Company; could be fired only by the Holland Company; and was paid by the Holland Company with paychecks issued in the name of the

Holland Company. Petn at A-4. Petitioner was not a member of a railroad union but a member of the United Steelworkers of America, and worked under a collectively bargained agreement to which respondent was not a party. Petn at A-5; App. at 3b. The Holland Company contributed one-half the premiums for the petitioner's life insurance and medical coverage. Petn at A-5. Petitioner had filed workmen's compensation claims for his injuries with the Holland Company, and had received compensation from the insurance carrier of the Holland Company. R. 125-26, 167-68.

These documents also demonstrated that the Holland Company has the right to control and in fact controls the means and methods of work at its Worthington plant. Petn at A-5, A-7; App. at 1a. The Holland Company directs the making of the weld, the running of the line, and the loading of the rail. App. at 2b. The role of the C&O inspector is limited to designating the type of rail needed, classifying the rail to be welded, inspecting the weld and designating the train on which the rails are to be loaded. Petn at A-5; App. at 1b. The C&O inspectors not only do not have the right to control the welding or loading operations, but in fact do not possess the training and skill required to exercise directive control over railwelding. App. at 4b. Under the contract, the Holland Company retains the right to make changes in its equipment at any time in order to improve the efficiency of the railwelding operations. R. 64.

Finally, respondent showed that at the time of the two alleged injuries, petitioner was serving as either a foreman or a shift leader and was not under the direction or control of respondent's employees. In fact, petitioner and his method of work were under the control and supervision of the Holland Company superintendent, petitioner's brother. App. at 2b.

In response to these submissions, petitioner argued that the contract between the Holland Company and respondent was a subterfuge to avoid liability and that a master-servant relationship existed between the Holland Company and respondent. R. 505. The trial court announced from the bench that it was granting summary judgment for respondent. R. 521.[1]

Three days later, on August 12, 1974, petitioner filed a Motion to Reconsider based on the newly transcribed deposition of James E. Vaught. R. 460. On August 26, 1974, petitioner filed an Additional Motion to Reconsider based on the affidavit of petitioner's brother dated August 25, 1974. R. 530. The trial court ordered these additional evidentiary materials to be filed, considered these materials, and issued an order granting summary judgment to the defendant. R. 538; Petn at A-16.

The Court of Appeals of Kentucky unanimously sustained this grant of summary judgment. In reviewing the trial court's determination of petitioner's employment status, the court of appeals applied the standard for summary judgment on this issue specified by *Baker v. Texas & Pacific Railway*, 359 U.S. 227 (1959). The court also specifically held that,

[1]In the course of announcing its ruling, the trial court stated:

> From the depositions and affidavits, it appears to me that over this particular employee, [the railroad inspectors] have no direction and the only supervision is over what is the quality of the end result and what are the rails that shall come as first, second and third to be done. But [they] have no control over any of the details in between.

R. 518.

under the relevant Kentucky rules and precedents,[2] the trial court had erred in permitting additional evidence to be filed after the date of the hearing on the motion for summary judgment.

Without dissent, the Supreme Court of Kentucky affirmed the courts below. The Court recognized that "the issue of control is one to be determined by a jury after a full, factual hearing," but reasoned that "where there is no genuine issue of fact which would support a finding that at the time of the injuries Barnes was under the control of C&O, the issue becomes a question of law for the judge to decide." Petn at A-3. The Court then listed the undisputed facts concerning the obligations and rights of the Holland Company under its contract with respondent:

> 1. It had the right to hire and fire and the right to negotiate with its employees through a labor union in the fixing of wages;
> 2. It owned and utilized specialty-type railwelding equipment;
> 3. Payment of wages was made with checks of Holland, with the usual and necessary withholding deductions;
> 4. By its lease and agreement, it contracted for the use of all of C&O's railwelding equipment and facilities, except the specialty equipment which it owned;
> 5. It trained its own personnel;
> 6. Its employees were members of the United Steel Workers of America;

[2]Kentucky Civil Rule 56.03 states, in part, "The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." The Kentucky courts have interpreted this rule to mean that, once the merits of the motion are ready for final submission, no additional evidence can be filed. Conley v. Hall, 395 S.W.2d 575 (Ky. 1965); Mills v. Reserve Life Ins. Co., 335 S.W.2d 955 (Ky. 1960).

7. It had the responsibility for the maintenance of all of the equipment;
8. It had other similar operations going on at other places in the United States and Canada;
9. It determined the means and methods for doing the work;
10. It controlled the amount of work;
11. It contributed one-half of the premiums for the employees' life insurance and medical coverage; and
12. It controlled what work was to be done and how to do it.

Petn at A-4 to A-5. The Court found that the obligations of C&O were much more limited:

1. It delivered rails to Holland at Worthington, Ky.;
2. It advised Holland of the type of rails to be welded;
3. It furnished and designated trains onto which the welded rails were to be loaded; and
4. It had the right to inspect and reject any weld of inferior quality.

Petn at A-5. Stressing that "[t]he primary factor is whether the railroad company had the power to direct, control or supervise Barnes in the performance of the work at the time of his injuries," the Supreme Court found that "[t]he responsibility for operating the production line effort from beginning to end (alpha to omega) was that of Holland and not of C&O." Petn at A-6, A-7. The Court therefore agreed with the conclusion of the court below that petitioner was an employee of Holland and that Holland was an independent contractor rather than a servant of the respondent.

The Kentucky Supreme Court also rejected petitioner's argument that the contract between the Holland Company and respondent was void as a subterfuge under Section 5 of the FELA, 45 U.S.C. (1976). "We find nothing in the record to suggest a subterfuge between C&O and Holland,

whereby the railroad purposefully attempted to avoid liability under the FELA by entering into the subject contract with Holland." Petn at A-8. "Irrespective of the fact that the result of Barnes' work, together with the work of the other employees of Holland could be classified as beneficial in the proper operation of a railroad, there is not one shred of evidence that the 'lease and agreement' between C&O and Holland was executed for the purpose of avoiding liability under the FELA." Petn at A-8.

Finally, with respect to the ruling of the court of appeals that petitioner's additional evidence had been erroneously admitted, the Supreme Court declared:

> This court is of the opinion that even without [*sic*; with?] the benefit of the deposition and the affidavit, there still was no genuine issue of material fact that at the time of Barnes' injuries he was engaged in work which properly was that of the railroad. Consequently, we do not reach this alleged error.

Petn at A-9.

ARGUMENT

I.

THE COURTS BELOW APPLIED THE CORRECT LEGAL STANDARD IN DETERMINING THAT PETITIONER WAS NOT AN EMPLOYEE OF RESPONDENT

The legal standard determining the applicability of the FELA to individual workers is well established. "From the beginning the standard has been proof of a master-servant relationship between the plaintiff and the defendant railroad." *Kelley v. Southern Pacific*, 419 U.S. 318, 323

(1974). Moreover, this Court has repeatedly reaffirmed that "for the purposes of the FELA the question of employment, or master-servant status, was to be determined by reference to common-law principles." *Kelley v. Southern Pacific, supra; Baker v. Texas & Pacific Railway,* 359 U.S. 227 (1959). In particular, the Court's recent opinions have relied on the Restatement (Second) of Agency for guidance as to the factors to be considered in determining whether a master-servant relationship exists so that the FELA can be applied. *Kelley v. Southern Pacific, supra,* 419 U.S. at 324; *Baker v. Texas & Pacific Railway, supra,* 359 U.S. at 228; *Ward v. Atlantic Coast Line Railroad,* 362 U.S. 396, 400 (1960).[3]

In *Baker v. Texas & Pacific Railway, supra,* this Court recognized that the question of employment status, like that of fault or causation, contains "factual elements" that may make this issue appropriate for jury consideration. 359 U.S.

[3]Section 220 of the Restatement (Second) of Agency lists the following factors to be considered in determining whether one acting for another is a servant rather than an independent contractor:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and
(j) whether the principal is or is not in business.

at 228. Nevertheless, the Court specifically noted that the question may be taken from the jury "if reasonable men could not reach differing conclusions on the issue." *Id.* Thus, the lower federal courts have frequently granted summary judgment for defendant railroads where there was no genuine issue of material fact with respect to the employment status of the plaintiff. *E.g., Hetman v. Fruit Growers Express Co.,* 346 F.2d 947 (3d Cir. 1965); *Ciaccio v. New Orleans Public Belt Railroad Commission,* 290 F. Supp. 197 (E.D. La. 1968); *De Paola v. New York, New Haven & Hartford Railroad,* 198 F. Supp. 12 (D. Conn. 1961).

The courts below correctly applied the legal standard established by this Court in determining that petitioner was not an "employee" of respondent. The court of appeals quoted the standard for summary judgment laid down in *Baker,* and relied on the list of factors provided in the instruction approved by this Court in *Ward v. Atlantic Coast Line Railroad, supra,* 362 U.S. at 398 n.1. The Supreme Court of Kentucky relied on the recent and extensive discussion of the issue of employment provided in *Kelley v. Southern Pacific, supra.* Both courts recognized that a determination of the issue "comes from a consideration of all of the circumstances of the case." Petn at A-6, A-11.

Petitioner does not point to any error of law in the reasoning of the courts below. Indeed, petitioner does not really challenge the legal standard utilized by them. Rather, petitioner suggests that there was adequate evidence of supervision of petitioner by respondent's employees to permit this issue to be sent to the jury.

The record does not support petitioner's assertions of factual conflict. It was undisputed that the Holland Company specializes in railwelding; that it brought petitioner to the Worthington plant; that it hired, fired, trained,

paid and insured its own employees at that site, and that Holland Company supervisory personnel controlled the production effort from "alpha to omega." Petn at A-7. Respondent's inspectors performed the limited and necessary tasks of designating the quantity and type of rail to be welded, inspecting and if necessary rejecting the welds, and designating the cars on which the rails were to be loaded. Petn at A-5. Respondent's inspectors did not even possess the necessary skill and training to undertake railwelding work, much less to direct the use of this unique machinery in the performance of skilled work. App. at 4b.

In support of his claim of factual conflict, petitioner relies on assertions contained in an affidavit filed by petitioner's brother after respondent's motion for summary judgment had been heard in the trial court. This affidavit mentions several occasions on which respondent's employees offered suggestions on inconsequential details to the Holland Company employees concerning their work. This affidavit does not provide a basis for reversing the courts below.

First, it is not clear that this material is properly in the record before the Court. The court of appeals specifically held that in admitting this evidence after the plenary hearing on the summary judgment motions, the trial court had committed error under Kentucky procedural law. Petn at A-13. The Kentucky Supreme Court opinion makes no reference to this evidence. That Court apparently concluded that it was unnecessary to pass on the court of appeals' procedural ruling, since even with the benefit of this evidence, plaintiff could not succeed. The language of the Kentucky Supreme Court, though unclear, suggests that the Court was preserving the ruling of the court below as an alternative procedural basis in support of its holding. Accordingly, review of the decision below by this Court, if not

entirely precluded,[4] would surely be pointless. On remand, the Supreme Court of Kentucky would remain free to make explicit its reliance on this alternate state procedural ground in sustaining the grant of summary judgment.[5]

More importantly, even if this affidavit were viewed as part of the record, it would not provide adequate proof of a master-servant relationship between respondent and petitioner. In *Kelley v. Southern Pacific, supra,* this Court analyzed a similar situation. There, the railroad supervisory personnel "were occasionally in the area where [the contractor] conducted its unloading operations and from time to time would advise or consult with [the contractor's] employees and supervisors." 419 U.S. at 327. The Court was not willing to find an employment relationship on the basis of "the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation." 419 U.S. at 330.[6] The Court contrasted the situation in *Kelley* with that in *Baker v. Texas & Pacific*

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[4]Plaintiff's burden of establishing jurisdiction is not met if "it appears that its judgment *might* have rested on a nonfederal ground." Durley v. Mayo, 351 U.S. 277 (1956). [Emphasis added.]

[5]"We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

[6]Similarly, in *Shenker v. Baltimore & Ohio Railroad,* 374 U.S. 1 (1963), the Court stated that "The intimations of the [respondent] that the petitioner might have been given directions by the P&LE baggageman is at most an example of the minimum cooperation necessary to carry out a coordinated undertaking, and, as noted in [*Standard Oil Co. v.*] *Anderson,* [212 U.S. 215,] cannot amount to control or supervision." 374 U.S. at 6.

Railway, supra, in which there was evidence to show that

> a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture.

359 U.S. at 228-29. The Court stressed that in the case before it, there had been "no such day-to-day supervision that would support a finding that petitioner and his coworkers were, in effect, employees of the railroad." 419 U.S. at 331. The occasional advice offered by respondent's inspectors surely would not amount to the "day-to-day supervision" required by the Court in *Kelley.*

In summary, the legal standard for determining employment status under the FELA is "not a novel one." *Kelley v. Southern Pacific, supra,* 419 U.S. at 332 (Stewart, J., concurring in the judgment). As the Court noted in its per curiam in *Baker,* each case presents "familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time." 359 U.S. at 228. Moreover, this Court has recognized that "[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative." *Id., quoting Cimorelli v. New York Central Railroad,* 148 F.2d 575, 577 (6th Cir. 1945); *accord, Missouri-Kansas-Texas Railway v. Hearson,* 422 F.2d 1037, 1042 (10th Cir. 1970) ("each case revolves around its peculiar facts"). Because there is no dispute as to the proper legal standard, and each case presents a unique factual situation, no purpose would be served by a grant of certiorari in this case.

II.

THE CONTRACT BETWEEN RESPONDENT AND THE HOLLAND COMPANY WAS NOT INVALID AS A SUBTERFUGE

The petition intimates that respondent's contract with the Holland Company was a device to "circumvent its responsibility under the Act." Petn at 13. Petitioner asks that the contract therefore be held invalid under Section 5 of the Act, 45 U.S.C. §55 (1976). Petitioner presents absolutely no basis in law or fact to support this argument.

First, petitioner is not entitled to invoke this section of the Act unless he is an "employee" within the contemplation of the Act. In *Robinson v. Baltimore & Ohio Railroad,* 237 U.S. 84 (1915), this Court declared:

> The application of this provision depends upon the plaintiff's employment. For the "liability created" by the Act is a liability to the "employees" of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was "employed" by the Railroad Company within the meaning of the Act.

237 U.S. at 91. Thus, the Court of Appeals for the Fifth Circuit has concluded:

> It should be obvious at the outset that the statutory provision against devices to avoid the employer's liability cannot be used to prove the existence of the legal situation — the employer-employee relationship — which calls into play both the statute creating this liability and the provision thereof which forbids any devices intended to avoid such liability. [Footnote omitted.]

Ward v. Atlantic Coast Line Railroad, 265 F.2d 75, 85 (5th Cir. 1959), *rev'd on other grounds,* 362 U.S. 396 (1960). In

light of these precedents, petitioner is compelled to concede that "one not an employee of the railroad cannot challenge the validity of a contract (such as entered into between respondent and the Holland Company) as being violative of the FELA." Petn at 8. This provision cannot be used to demonstrate that petitioner is an employee of respondent because, as petitioner admits, "the provision is not applicable if plaintiff is not an employee within the meaning of the FELA." Petn at 8.

Second, there is no record evidence to support the insinuation that the contract between the Holland Company and respondent was executed in order to avoid liability under the Act. The Holland Company has been in the railwelding business for many years. It owns specialized welding equipment not available in the United States from any other source. The Holland Company's plant at Worthington was one of many such operations throughout the Eastern United States and Canada. Indeed, the Supreme Court of Kentucky could not find "one shred of evidence" that the complex lease and agreement between respondent and the Holland Company was executed for the purpose of avoiding liability under the FELA. Petn at A-8. This allegation, like petitioner's allegations with respect to his employment status, provides no basis for overturning the decisions of the three courts below.

CONCLUSION

This case meets none of the criteria set forth in Rule 19 of this Court for the granting of certiorari. There is no novel issue of law in this case nor is there any conflict between the decision below and the decisions of this Court. In the final analysis, this case involves only the application of well-established law to a particular set of facts and circumstances. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

LAIDLER B. MACKALL
STEPTOE & JOHNSON
1250 Connecticut Avenue
Washington, D.C. 20036
(202) 862-2010

PAUL C. HOBBS
GRAY, WOODS & COOPER
908 Second National Bank Bldg.
Ashland, Kentucky 41101

Attorneys for Respondent

APPENDIX A

AFFIDAVIT OF JOHN A. LIDDELL

Comes the affiant, John A. Liddell, after first being duly sworn states as follows:

The affiant John A. Liddell is President of the Holland Company which has home offices at 1020 Washington Avenue, Chicago Heights, Illinois 60411.

The affiant states that the Holland Company operates a railwelding plant at Worthington, Kentucky pursuant to a contract between the Holland Company and The Chesapeake and Ohio Railway Company dated the 16th day of October, 1970, a copy of which is attached hereto and made a part hereof. Said operation has been continuous since the effective date of the contract until the present time.

The affiant states that he has read the affidavit of James E. Vaught, Sr. and to the best of his knowledge and belief, the statements contained therein are true and correct. The affiant attaches hereto and makes a part hereof said affidavit of James E. Vaught, Sr. dated June 18, 1974.

The affiant further states that as a contractor and operator of the railwelding plant at Worthington, Kentucky, the Holland Company retains and assumes control over the means, methods of work and employees at the Worthington plant and has done so at all times from the effective date of this contract and continuously thereafter and that the right of control and exercise of control over the work is retained by and belongs to the Holland Company. The affiant states that The Chesapeake and Ohio Railway Company neither has nor retains control over the welding operation or the loading of the rails at this operation except as to the quality of the rail and as to the quality of the weld of the rail and that The

Chesapeake and Ohio Railway Company does not have the right to exercise and has not exercised control since the effective date of this contract, over the method of work performed by the Holland Company in making the weld, running the line or loading the rails.

The affiant states that the employees of the Holland Company are members of the United Steel Workers of America and further that the right to hire and fire these employees belongs to the Holland Company and that the training of the personnel remains with and is retained by the Holland Company. The affiant states that The Chesapeake and Ohio Railway Company does not have the right of veto over the hiring of employees, training or method of work by the Holland Company employees.

The affiant states that the method and rate of pay of the employees of the Holland Company is controlled by the Holland Company and the Holland Company employees' bargaining agent, United Steel Workers of America; that the negotiations concerning the rate of pay and working conditions are carried on by the representatives of the Holland Company and the United Steel Workers of America and that The Chesapeake and Ohio Railway Company has not participated in any way in the negotiations between the Holland Company and the labor union.

The A-I railwelding machine used to weld the rails in question is owned by the Holland Company and not by The Chesapeake and Ohio Railway Company and that the heart of the entire operation at the Holland plant at Worthington Kentucky is the ownership and control of the railwelding machine. The affiant states that the A-I railwelding machine was developed and produced by A-I Welders, Inc., a firm in Scotland. The Holland Company is the exclusive representative of said A-I Welders, Inc. in the United States and

Canada and has the exclusive authority to control said equipment in the United States and Canada. The contract between the Holland Company and The Chesapeake and Ohio Railway Company for work to be performed at Holland Company's plant in Worthington, Kentucky is premised upon the use of the A-I machines and equipment within the control of Holland Company.

The affiant states that Robert Barnes is an employee of the Holland Company, was an employee of Holland Company on July 15, 1971, and has been for many years and that at the time the railwelding equipment was moved to the Worthington plant, the Holland Company transferred Robert Barnes to the Worthington plant because of his skill, knowledge and expertise in the use of the railwelding equipment at other Holland locations. The affiant states that The Chesapeake and Ohio Railway Company had absolutely nothing to do with the transfer of Robert Barnes to the Worthington plant of the Holland Company for work to be performed in the contract with the Chesapeake and Ohio Railway Company.

This the 28th day of June, 1974.

/s/ John A. Liddell
John A. Liddell

STATE OF ILLINOIS
COUNTY OF COOK

Subscribed and sworn to before me by John A. Liddell, this 28th day of June, 1974.

My commission expires March 25, 1978.

/s/ Elsie Reynolds
Notary Public, _____,
Illinois.

(S E A L)

APPENDIX B

AFFIDAVIT OF JAMES E. VAUGHT, SR.

Comes the affiant, James E. Vaught, Sr., after first being duly sworn, states as follows:

The affiant, age 42, is employed by the Chesapeake and Ohio Railway Company as superintendent, railwelding plant at Worthington, Kentucky and has been so employed since June, 1968. The affiant states that his primary duties consist of inspection of work performed by the Holland Company, a contractor and operator of the railwelding plant at Worthington, Kentucky.

The affiant states that the Holland Company operates the railwelding plant pursuant to a contract between the Chesapeake and Ohio Railway Company and the Holland Company and has been doing this since 1971. The affiant states that the extent of control he, as superintendent of the Chesapeake and Ohio Railway Company has over the operation is that the Chesapeake and Ohio Railway Company advises the Holland Company employees as to (1) type of rail to be welded; (2) classification of rail to be welded; (3) designation to the Holland Company the train onto which the welded rail is to be loaded. The Chesapeake and Ohio Railway Company retains the right to reject any rail or weld after the Holland Company employees perform their work on the rail or weld and further the Chesapeake and Ohio Railway Company reserves the right to reject any rail prior to its being placed on the welding line feed table and reserves the right to inspect the rails prior to their being welded and also assists the Holland Company employees in classifying rails prior to their being placed onto the assembly line.

The affiant states that the Chesapeake and Ohio Railway Company does not retain or assume control over the means and methods by which the Holland Company's work is done; that the right of control and exercise of control over the work to be performed and the employees to perform the work belongs with the Holland Company, their supervisors, agents and employees.

The affiant states that the Chesapeake and Ohio Railway Company neither has nor retains control over the welding line and the loading of the rail except as to the quality of the rail and as to the quality of the weld and that neither he nor the Chesapeake and Ohio Railway Company exercises any control over the method of work performed by the Holland Company in making the weld, running the line and loading the rails.

The affiant states that Robert W. Barnes was an employee of the Holland Company on the date he was injured, namely, July 15, 1971. The affiant further states that at no time was Robert W. Barnes ever an employee of the Chesapeake and Ohio Railway Company and as of the date he was injured, namely, July 15, 1971, Robert W. Barnes was employed by the Holland Company as either a foreman or a shift leader and was operating in such a capacity on that date and was not under the control, direction or supervision of the Chesapeake and Ohio Railway Company agents, servants or employees; that at the time and on the occasion of the accident, Robert W. Barnes was under the direction, control and supervision and his method of work and control over his work was under the control and supervision of the Holland Company through their superintendent, Al Barnes, brother of Robert W. Barnes.

The affiant states that on the date of the accident, namely, July 15, 1971, he was not present and did not witness the

accident of Robert W. Barnes and that his first knowledge that Robert W. Barnes was injured was when he was told by one of his inspectors to call an ambulance, that Mr. Barnes had been injured. The affiant states that he did not give direction as to the performance of the work by the Holland Company employees in the loading of the rails at the time of the injury to Mr. Barnes nor did he give directions as to the performance of the details of the work as to the correction of the malfunction of the loading of the rails in any manner and to the best of his knowledge and belief, the details of the loading of the rail and the handling of the malfunction of the loading was under the control and supervision of Mr. Al Barnes, Holland Company superintendent and Mr. Robert W. Barnes, line foreman or shift leader of the Holland Company.

The affiant states that the employees of the Holland Company to his knowledge, are members of the United Steel Workers of America and not members of a railroad union; that neither he nor the Chesapeake and Ohio Railway Company has any right to hire or fire employees of the Holland Company; that the right to hire and fire those employees remains with the Holland Company; the training of the personnel of Holland Company remains with and is retained by the Holland Company. The Chesapeake and Ohio Railway Company does not have any right of veto over the hiring, employment, training or working by the Holland Company employees.

The railwelding equipment and A-I railwelding machine used to weld the rails in question and the A-I stripper and shears are owned by the Holland Company and this equipment is not maintained or supervised in any manner by the Chesapeake and Ohio Railway Company. All other equipment at this plant is owned by the Chesapeake and Ohio Railway Company and leased to the Holland Company as well as the land on which this railwelding plant is located

and that the maintenance and upkeep of this equipment is handled by the Holland Company according to the terms and conditions of the contract with the exception of the Pettybone crane, an air compressor, a portable welder and rail cars. All other equipment was maintained by the Holland Company according to the terms and conditions of the contract.

The affiant states that the railwelding machine owned by the Holland Company is operated only by Holland Company employees and that the Chesapeake and Ohio Railway Company inspectors employed on the job do not possess the skill and training required in that particular occupation; that the railwelding machine operators and supervisors are supplied by the Holland Company.

The affiant states that the method and rate of payment of the employees of Holland Company is controlled by the Holland Company and that the Holland Company's employees' bargaining agent is the United Steel Workers of America and that the Chesapeake and Ohio Railway Company does not and did not participate in the establishment of working conditions, job titles, classifications, rates of pay or fringe benefits; that this is a matter between the Holland Company and the United Steel Workers of America.

The affiant states that as of July 15, 1971, the date of this accident, the only Chesapeake and Ohio Railway Company's employees at the railwelding plant were salaried employees in the inspector category and that there was no community of interest between the employees of the Chesapeake and Ohio Railway Company and the employees of the Holland Company.

The affiant states that the employees of the Holland Company as of the time of this accident, were paid and employed and covered under the Social Security program and not under Railroad Retirement as are all employees of

the Chesapeake and Ohio Railway Company, according to federal law. The affiant states that the Holland Company's operation at the railwelding plant at Worthington, Kentucky, to his knowledge, is one of the several installations of the Holland Company wherein they perform other work for other railroads and companies at various locations throughout the United States and Canada and that the employees, supervision, training, payment and transfer of these employees of the Holland Company from their various locations is fully under the control of the Holland Company and that the Chesapeake and Ohio Railway Company neither retains nor exercises control of these matters.

The affiant states that the Chesapeake and Ohio Railway Company does not possess the equipment, training or skill necessary to perform the work that the Holland Company and its employees do at the Worthington, Kentucky railwelding plant.

This the 18th day of June, 1974.

/s/ James E. Vaught, Sr.
James E. Vaught, Sr.

STATE OF KENTUCKY
COUNTY OF BOYD

Subscribed and sworn to before me by James E. Vaught, Sr., this 18th day of June, 1974.

My commission expires 9/26/77.

(S E A L)

/ss/
Notary Public, State-at-Large,
Kentucky.

APPENDIX C

SUPPLEMENTAL AFFIDAVIT OF JAMES E. VAUGHT, SR.

Comes the affiant, James E. Vaught, Sr., after first being duly sworn, states as follows:

The affiant, age 42, is employed by the Chesapeake and Ohio Railway Company as superintendent, railwelding plant at Worthington, Kentucky and has been so employed since June, 1968. The affiant states that his primary duties consist of inspection of work performed by the Holland Company, a contractor and operator of the railwelding plant at Worthington, Kentucky.

The affiant states that he has no knowledge of an accident involving Robert W. Barnes on or about April 2, 1973. The affiant states that he knows of no employees [sic] of the Chesapeake and Ohio Railway Company who has knowledge of an accident on April 2, 1973 concerning Robert W. Barnes.

The affiant states that on the 18th day of June, 1974 he made an affidavit to be used in the lawsuit of Robert W. Barnes against the Chesapeake and Ohio Railway Company and that all of the allegations, statements and facts as set forth in that affidavit are hereby readopted and reaffirmed as being true as to the situation that existed at the railweld plant as of April 2, 1973 and at all times while Mr. Robert W. Barnes was employed by the Holland Company at the railweld plant at Worthington, Kentucky.

This the 18th day of July, 1974.

/s/James E. Vaught, Sr.
James E. Vaught, Sr.

STATE OF KENTUCKY
COUNTY OF BOYD

Subscribed and sworn to before me by James E. Vaught, Sr., this 18th day of July, 1974.

My commission expires September 8, 1976.

/s/Ruth Craft
Notary Public, State-at-Large,
Kentucky.

NOTARY'S
SEAL: